No. 20095

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

PETER M. ELLIOTT, as Trustee in Bankruptcy of the Estate of Van's Market, a Co-partnership composed of KENNETH M. PRICE and WILLIAM R. BABINEAU, Bankrupt,

Appellant,

vs.

A. J. BUMB, as Trustee in Bankruptcy of the Estate of Security Currency Services, Ltd., Bankrupt, and CORPORATION COMMISSIONER FOR THE STATE OF CALIFORNIA,

Appellees.

BRIEF OF APPELLEE A. J. BUMB.

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BRIEF OF APPELLEE A. J. BUMB.

I.

Statement of Case.

For convenience and brevity, the parties and entities involved in this appeal are herein referred to as follows:

Peter M. Elliott, as Trustee in Bankruptcy of the Estate of Van's Market, a co-partnership (Applicant and Appellant): Trustee.

A. J. Bumb, as Trustee in Bankruptcy of the Estate of Security Currency Services, Ltd., bankrupt (Respondent and Appellant): Bumb.

Van's Market, a co-partnership composed of Kenneth M. Price and William R. Babineau (Bankrupt): Van's.

Security Currency Services, Ltd.: Security.

Corporation Commissioner for the State of California (Respondent and Appellee): Commissioner.

Credit Managers Association of Southern California: Association.

On September 18, 1964, Trustees filed an Application for Order to Show Cause against the Association, Bumb, and the Commissioner, to require them to show cause why orders should not be entered declaring "any statutory lien" in favor of Bumb, Security, or the Commissioner, with respect to any funds of the within bankruptcy estate to be null and void pursuant to Section 67(c)(2) of the Bankruptcy Act (11 U.S.C. §107) and ordering the Association to remit to Trustee the balance of the funds of the bankrupt which it held at that time. [R. 2-4.] Such an Order to Show Cause issued on September 18, 1964. [R. 5-6.] The Answer filed by Bumb to the Application alleges that he asserts not a "statutory lien" as set forth in Section 67(c)(2) of the Bankruptcy Act, but rather, a trust fund as expressly provided in Section 12300.3 of the California Financial Code, which trust fund is not a statutory lien under the aforesaid Section of the Bankruptcy Act. [R. 81-82.] The Commissioner, in his answer to the Application, likewise takes the position that the funds in question are held in trust as specifically and expressly provided for in Section 12300.3 of the California Financial Code. [R. 84-86.] The Association did not file an Answer herein.

An Order of the Referee was entered adjudging that any trust created in favor of Security pursuant to Sections 12300.3 and 12300.4 of the California Financial Code is wholly invalid against the Trustee herein pursuant to Section 67(c)(2) of the Bankruptcy Act and that the funds in question are assets of the within estate, free and clear of any right, title, lien or other interest whatsoever in favor of Security, and ordering the Association to turn over to Trustee the funds in question which it held. [R. 123.] Bumb and the Commissioner petitioned for Writ of Review by the United States District Judge. [R. 7-15; 16-24.]

On review, the United States District Court determined that proceeds from the sale of money orders and checks by Van's as agent for Security, whether deposited to a trust account or comingled with assets of Van's, constitute trust funds which are not subject to the provisions of Section 67(c) of the Bankruptcy Act, reversed the order of the Referee, and ordered the cause recommitted to the court below. [R. 79-80.] This appeal by Trustee followed.

II.

Summary of Facts.

The case at bar has been briefed and argued before the Referee based upon a Stipulation of Facts [R. 109-111] and before the District Court upon said Stipulation of Facts and a written Agency Franchise and Trust Agreement [R. 134-135] which agreement was admitted in evidence before the District Court pursuant to a Stipulation to Admit Additional Evidence [R. 76] and Order 47 of the General Orders in Bankruptcy. As Trustee, in his Opening Brief, has alleged that the

Commissioner and Bumb have failed to trace the trust *res,* it is thought necessary to briefly reiterate the facts set forth as aforesaid.

On or about November 15, 1962, a written Agency Franchise and Trust Agreement was executed by and between Van's and Security, by which Security appointed Van's its "Agent for the purpose of issuing Money Orders". [Ex. "A"; R. 134-135.] Under paragraph 1 of said Agreement, Van's agreed to hold all proceeds for the face value of money orders issued, plus 50% of the fees therefrom, in trust for Security, and entirely separate and apart from other funds in Van's possession. [*Id.*] In paragraph 12 of said Agreement, Van's acknowledged receipt of 200 of the subject money orders from Security. [*Id.*]

On October 15, 1963, Van's executed a general assignment for the benefit of creditors to the Association, and Van's ceased doing business on said date. [R. 110.] Subsequently, on November 19, 1963, an Involuntary Petition in Bankruptcy was filed against Van's; Van's was adjudged a bankrupt on March 5, 1964; and Trustee is the duly appointed, qualified, and acting trustee of the within estate. [R. 109.]

For the period preceding October 15, 1963, there is due to Security from Van's the sum of $3,092.99, representing proceeds from the sale of money orders and checks sold by Van's as agent for Security, together with the additional sum of $16.17 representing fees for the sales of checks, making a total obligation due from Van's to Security of $3,109.16, all money orders and checks for which were honored and paid by Security. [R. 110.] The Association is presently holding the sum of $2,014.99, which sum represents moneys

which were on deposit in Van's bank account prior to October 15, 1963, at Bank of America, Harbor and Palm Branch, Los Angeles, California, and which represented money orders sold by Van's for Security. [*Id.*] (The Association has been found to be asserting no claim to said funds and to merely be seeking a determination as to what should be done with them. [R. 121.] To the best of the knowledge of the undersigned, said finding of the Referee has not been and is not now contested.) The difference between the total obligation due from Van's to Security ($3,109.16) and the sum of $2,014.99 being held by the Association (*i.e.*, $1,094.17) was commingled by Van's with its other assets. [R. 110.] Said assets were liquidated by the Association and the proceeds, in the sum of $2,987.56, were turned over by the Association to Trustee. [R. 121; Op. Br. p. 4.]

Security filed a Petition under the terms of Chapter 11 of the Bankruptcy Act on January 16, 1964, and was later adjudged a bankrupt. Bumb is the trustee in that matter, being Bankruptcy No. 166114-TC in the United States District Court, Southern District of California, Central Division [R. 120; Op. Br. p. 4], and the Commissioner asserts no claim to the funds held by Trustee for the Association, but is charged with the responsibility of enforcing the Check Sellers and Cashers Law set forth in Sections 12000, *et. seq.* of the California Financial Code. [R. 85, 121.]

III.
ARGUMENT.

1. **The District Court Did Not Err in Finding That Proceeds From Sale of Money Orders and Checks by Van's as Agent for Security, Whether Deposited to a Trust Account or Commingled With Assets of Van's, Constitute Trust Funds, Which Trust Funds Are Not Subject to the Provisions of Section 67 (c) of the Bankruptcy Act.**

A. **A Careful Examination of Section 12300.3 of the California Financial Code Reveals That the Trust in Question Has Its Origins in Equity and the Law of Agency, and, Even if It Is Determined to Be a Statutory Trust, It Is Clearly Analogous to an Express or Constructive Trust.**

By enacting the Check Sellers and Cashers Law set forth in Provision 3 of the California Financial Code, Section 1200 *et seq.* the California Legislature has provided a format for careful regulation of persons and business entities occupying positions in the business world of this State identical to those occupied by Security and Van's. The Law provides licensing requirements and regulatory provisions to be administered and enforced by the Commissioner of Corporations of the State of California. We are here primarily concerned with Section 12300.3 of said Law which provides, in relevant part,

> "All funds received by a licensee or its agents from the sale of checks, drafts, money orders, or other commercial paper serving the same purpose . . . equal in amount to the face value of such instruments . . . shall constitute *trust funds* owned by and belonging to the person from whom they were

> received *or a licensee who has paid the checks, drafts, money orders or other commercial paper* . . . for which the funds of such persons have been received by the agent but not transmitted to such licensee or deposited in the trust account of such licensee. If a licensee or an agent of a licensee shall commingle such funds with those of his own, all assets of such agent shall be impressed with a *trust* in favor of said purchaser or the licensee in an amount equal to the aggregate funds received or which should have been received by the agent from such sale. Such *trust* shall continue until an amount equal to said funds is separated from those of the agent and transmitted to the licensee or deposited in the trust account of licensee. An amount equal to all such *trust funds* shall be deposited in a bank or banks in an account or accounts in the name of the licensee designated 'trust account,' or by some other appropriate name indicating that the funds are not the funds of the licensee or of its officers, employers, or agents. Such funds, or, in the event of the commingling of such funds by licensee or its agent with those of the licensee or its agent, an amount of funds of such licensee or of its agent equal thereto, shall constitute *trust funds* as herein provided. . . ." (Emphasis added.)

Trustee alleges that any trust created in favor of Security pursuant to Section 12300.3 of the California Financial Code is a statutory trust. (Op. Br. p. 9.) Without unduly engaging in an argument over semantics, it is respectfully submitted that said allegation is not necessarily correct. Careful examination of the subject Section reveals that it refers to at least two, and possibly

three, trusts. One trust is for the benefit of the purchaser of the check, draft, money order, or other commercial paper; the second trust is for the benefit of the licensee (Security in the case at bar). The Section, in addition, provides that all assets of a commingling agent "shall be impressed with a trust" in favor of such purchaser or licensee; it appears that this language may be interpreted as providing a remedy for the party or parties injured by the commingling, or, in the alternative, as referring to a trust which is analogous to a resulting or constructive trust. It is the second trust (*i.e.*, the trust for the benefit of Security) and the remedy or third trust with which we are herein concerned.

The editors of *Collier on Bankruptcy,* in their discussion of Section 67 of the Bankruptcy Act, note that it is not always easy to label a lien as being statutory or non-statutory in nature. *4 Collier on Bankruptcy,* paragraph 67.20, page 184 (14th Edition, 1964). The treatise goes on to say,

> "thus, the lien of distress for rent, may at times seem to be no more than a common law variety of lien; yet statutes may regulate or modify the remedy. The same difficulty may arise as to other types of liens having common law origins and modern statutory refinements. An issue in such cases is whether the legislation has supplanted the common law lien or has created an additional lien. If the statute is supplementary, thereby recognizing a common law lien while creating a new statutory lien, the question arises: in what category does the asserted lien belong? There may even be difficulty in distinguishing between liens that are contractual and those that are statutory within subdivisions

(b) and (c). It is suggested, however, that the lien created or recognized by statute within the meaning of Section 67 arises primarily from an economic relationship defined by the legislature and not from the terms of the contract providing for security. The doctrine of *ciusdem generis* plainly applies. By this test the security of the trust receipt or mortgage on a shifting stock of merchandise, the factor's lien, or a secured transaction within Article 9 of the Uniform Commercial Code is contractual rather than statutory, even though without the statute the agreement of the parties would not effectively create a lien valid under non-bankruptcy law.

"Whether a lien exists within Section 67 (b) is ordinarily said to be determined by reference to the law of the state where the property is located. The policy of the Banruptcy Act to distinguish carefully between liens and priorities may, however, oblige the court to peer behind the label fastened on a particular interest by state law to discover whether what is there denominated a lien is actually, as a matter of bankruptcy law, no more than a priority." [*Id.*]

It is submitted that the question of whether or not the subject trust (or trusts) is a "statutory" trust, particularly in view of the fact that Trustee maintains that the trust in question should be treated as a lien under Section 67(c)(2), lends itself to the foregoing analysis. Specifically, it is not disputed that Van's was, at all times relevant herein, an agent of Security for the purpose of selling money orders or checks. [R. 110, lines 10-12.] The fiduciary nature of the agent-princi-

pal relationship does not appear to be open to controversy. See, *e.g.,* California Civil Code Section 2322(3); 1 Witkin, *Summary of California Law,* Agency and Employment, Section 26, page 404 (7th Edition, 1960). Furthermore, it has been stated that,

> "where a person acquires the legal estate and property as the agent of another, or on trust and confidence that he will acquire it for the benefit of another, equity will imply a trust in favor of the latter." 89 *Corpus Juris Secundum,* Trusts, Section 151, page 1068.

The same authority states, at page 1064, that,

> ". . . An agent undertaking any business or performance of any services for another is disabled in equity from dealing with the subject matter of the agency on his own account or for his own benefit, and if he does attempt so to deal in his own name he will be deemed a constructive trustee for his principal."

In view of the foregoing, it is further submitted that the California Legislature, when it enacted the portions of Section 12300.3 of the California Financial Code regarding a trust in favor of licensees such as Security, did not create a "statutory trust", but rather, merely gave statutory recognition to a trust relationship previously in existence.

Section 67(c)(2) of the Bankruptcy Act, upon which Trustee so heavily relies, affects statutory liens ". . . created or recognized by the laws of any state . . ." The

same wording appears in Section 67(b) of the Bankruptcy Act, and in Note 16c, page 185, paragraph 67.20 of *4 Collier, supra,* referring to said language, it is stated:

> "Nothing in the explanations of the legislative draftsmen indicates why it was thought necessary to provide for liens *recognized* as well as *created* by 'the laws of the United States or of any State.' It has been suggested that a 'recognized' lien may very appropriately be one that is not explicitly 'created' by statute, but is deemed to arise by virtue of the rights actually conferred by statute. Hanna, Preferences as Affected by Section 60 (c) and Section 67 (b) of the Bankruptcy Law (1950) 25 Washington Law Review 1, 12, 24 Journal of National Association of Referees 115, 118, citing as an example the lien recognized in *In Re Famous Furniture Co.* (Eastern District New York 1942) 51 Am.B. R. (N.S.) 528, 42 F. Supp. 777." (The lien recognized in the *Famous Furniture Co.* case was that of a city marshal for payment of his statutory fees for levying execution on judgments against a bankrupt recovered within four months prior to the institution of the bankruptcy proceeding.)

By analogy to the foregoing analysis regarding statutory liens, it is submitted that the trust (or trusts) in the case at bar are not trusts "recognized" by state law within the meaning of the relevant sections of the Bankruptcy Act.

The provisions in California Financial Code Section 12300.3 regarding trusts in favor of licensees (Security, herein) were added by the California Legislature in 1963, and to the best of the knowledge of the undersigned there are no reported cases interpreting the 1963 revision. However, the Supreme Court of the State of California has decided a case regarding the trust created by said section in favor of purchasers of checks, drafts, money orders, etc., which trust, it is submitted, is truly a "statutory trust." The Court, in a unanimous decision, said,

> "In terms of trust law, when a check is sold the licensee becomes the trustee, the purchaser becomes the trustor, and the third party payee and holders in due course become the beneficiaries of the *trust*. The Legislature, by Section 12300.3, has authorized both trustor and beneficiaries to enforce the trust, but has denied to general creditors . . . the right to attack or levy upon the *trust* funds. The rules thus laid down by the statute appear fair and equitable . . ." (Emphasis added.) *Bank of America v. Bowden,* 46 Cal. 2d 863, 868, 300 P. 2d 10 (1956).

It is submitted that, in view of the fact that the Supreme Court of California has recognized the trust for the benefit of purchasers created by the subject section of the Financial Code to be a "trust," there can be little doubt that the same Court would hold that the licensees (principals) are beneficiaries under trusts held by their agents as provided by the 1963 amendments.

The California Legislature, in Civil Code Section 2872, has defined the term "lien" so as to specifically exclude a "trust". Furthermore, said Legislature has defined the term "trust" in Sections 2216 and 2217

of the Civil Code. Thus, the fact that the legislature recognizes the distinction between a lien and a trust does not appear open to controversy. Likewise, it may be assumed that Congress, when it refers to "liens", as it does in Section 67(c), means "liens" and not "trusts".

At least since 1940, when the case law cited by *Collier on Bankruptcy* for the proposition that Bankruptcy Courts follow and apply the local law regarding recognition of statutory trusts was made, Congress has been aware of and could have changed the wording of the relevant sections of the Bankruptcy Act to include statutory trusts as well as statutory liens. It is respectfully submitted that, if Section 67(c) should be made applicable to statutory trusts, it is for the legislative rather than the judicial branch of the Federal Government to so decide, and that unless and until said section is amended by Congress to include such trusts, Section 67(c) should be deemed to have no effect thereon.

C. Even if It Is Determined That the Trust Referred to in Financial Code Section 12300.3 in Favor of Security Is a Statutory Trust and That It Should Be Treated in the Same Manner as a Statutory Lien Under Sections 67(c)(2) of the Bankruptcy Act, Security Is Entitled to the Funds in Question Because Security Had Possession Thereof Through Its Agent, Van's.

Section 67(c)(2) of the Bankruptcy Act invalidates ". . . statutory liens . . . on personal property not accompanied by possession . . .", as against the Trustee in Bankruptcy of Van's. The words "accompanied by possession" have been determined to refer primarily to possession at the date of filing of the petition initiating

proceedings under the Bankruptcy Act. *4 Remington on Bankruptcy,* Section 1637.2, page 108 (Revised Edition, 1957) and cases there cited. The same treatise, at page 109, observes

> "It is probably safe to say . . . that only actual possession of personalty, prior to and at the time of filing of the petition initiating proceedings under the Act, held personally by the lienholder *or by an agent,* servant, or officer acting for him and in his behalf, will render either the subordinating or the invalidating provisions of (the 1952 amendment of) Section 67 (c) inapplicable. This statement, however, goes somewhat beyond the decisions to date, none of which construed the section as amended in 1952, and may turn out to be too sweeping." (Emphasis added.)

The word "possession" has been duly recognized to be ambiguous. (4 *Remington, supra,* at p. 109 quoting Judge Frank in *New York v. Hall,* 139 F. 2d 935, 55 A.B.R. (N.S.) (C.A.N.Y., 1944).) Congress, however, has apparently not seen fit to elaborate upon the phrase since 1952. *4 Collier, supra,* paragraph 67.281, at page 312, note 8, in its general analysis of Section 67(c)(2), comments that

> "ordinarily levy, sequistration, or distraint would seem to confer possession on *an agent* of a lienor if not on the lienor himself. Such possession would appear to be sufficient under Section 67-(c) (1) as well as Section 67 (c) (2). . . ." (Emphasis added.)

It is submitted that the possession of the funds in question by Van's as *agent* of Security should be

deemed by this Court to constitute sufficient "possession" by Security to remove the funds from the scope and affect of Section 67(c) of the Bankruptcy Act. Van's was, as to all the world, an agent of Security; the general unsecured creditors of Van's could not and should not have considered the funds held by Van's as such agent to be funds belonging to Van's and, ultimately, funds of the within estate.

2. The Funds in Dispute Were Held by Van's in Trust for Security Regardless and Irrespective of the Trust Referred to in Section 12300.3 of the California Financial Code.

A. Express and Constructive Trusts Were Created by the Execution of the Agency Franchise and Trust Agreement by Van's and Security and Their Acts Subsequent Thereto.

Section 2221 of the California Civil Code provides,

> "Subject to the provisions of Section 852, a voluntary trust is created, as to the trustor and beneficiary, by any words or acts of the trustor, indicating with reasonable certainty: (1) an intention on the part of the trustor to create a trust, and, (2) The subject, purpose, and beneficiary of the trust."

Section 2222 of the Civil Code states,

> "Subject to the provisions of Section 852, a voluntary trust is created, as to the trustee, by any words or acts of his indicating, with reasonable certainty: 1. his acceptance of the trust, or his acknowledgment, made upon sufficient consideration, of its existence; and, 2. the subject, purpose, and beneficiary of the trust." (Section 852 of the Civil Code, regarding trusts relating to real estate is not here relevant.)

The Agency Franchise and Trust Agreement by and between Security and Van's [Ex. "A"; R. 134-135.] expressly provides that "Agent shall hold all (proceeds) in trust for Security entirely separate and apart from other funds in possession of agent until remitted." It appears that the only question raised herein regarding the compliance of said agreement with the above quoted sections of the Civil Code arises regarding the existence of the "subject" of the trust provided for and obviously intended by the parties to the agreement. It is unlikely that any proceeds from the sale of money orders, checks, etc. were in existence on or about November 15, 1962, when the agreement was executed. Trustee alleges that because no such monies were then in existence no trust other than those referred to in Financial Code Section 12300.3 can be found to exist. It is respectfully submitted that said Agency Franchise and Trust Agreement, if not deemed a valid trust agreement or declaration of trust, is at least a contract to settle in trust the proceeds in question which resulted in a valid express trust of said monies no later than upon Van's receipt thereof. It is further submitted that, even if this Honorable Court should determine that no such express trust was created as aforesaid, it is clear that said monies were held by Van's under constructive trust.

It is hereby not disputed that

> "a trust may fail as a present trust because the trust property sought to be made the basis of it is not in existence or because the property which is to be the *res* (although existent) is not owned by the settlor." *1 Bogert, The Law of Trusts and Trustees,* Section 113, page 575 (2nd Edition, 1965).

It has been recognized however, that

> "there may be a *contract* to settle in trust an interest in non-existent subject-matter at a future date when it comes into being and the promisor acquires title to it. Courts of *law* treat transactions which purport to be present transfers or declarations of trust of interests in future things as not amounting to contracts and as void. *Equity* has taken a different attitude toward present efforts in return for consideration to create present trusts in future subject-matter. It has reasoned that such a transaction could not have been intended to operate as a present act of trust creation because of the inherent impossibility of such an effect. The parties must therefore have expected the only other possible presently operative result, namely, that there should arise a contract to create a trust in the future. The parties are not to be deemed to have intended a futile act. Viewed as a contract to create a trust in the future, when the subject-matter came into being and was acquired, equity found that in the common law there was no remedy at all. The law did not recognize the existence of such a contract. There was more than inadequacy of remedy; there was total absence of remedy at law. Equity therefore took the position that it would give specific performance or its equivalent. When the subject matter came into existence and into the hands of the intended settlor, it would at once be deemed to be held in trust, without any act of appropriation by the intending settlor, assuming that there was consideration for the transaction. In other words, if one purported for value to make a present

declaration of trust of corporate shares which he did not own, or which did not then have existence, and later the declarant gained title to shares of the kind described, equity would treat the trust as taking effect on the acquisition of the shares and an equitable interest as then passing to the beneficiary." *1 Bogert, supra,* Section 113, pages 575-576.

Trustee asserts at page 27 of his Opening Brief that the case of *Balian v. Balian's Market,* 48 Cal. App. 2d 150 (1941), supports the proposition that because the subject of the intended trust was not in existence at the time the agreement was executed, the trust must fail. The facts before the Court in the *Balian* case were quite complex. Plaintiffs alleged an oral agreement to place all earnings and property acquired by the members of the Balian family in a common fund or trust; the Court found that only one of the several children involved was of age at the time of the alleged agreement; the agreement contained no provisions as to the matter in which the father, as trustee, was to handle any property acquired, nor any restrictions upon his disposing of all or any part thereof; and that the agreement merely provided for distribution to the children then surviving upon the death of the father. The Court noted that there was no property or *res* upon which the alleged trust could operate. *Balian v. Balian's Market, supra,* pages 155-156. The Court went on to state:

"We think the terms of the trust agreement are altogether too uncertain and tenuous to have warranted the trial court impressing a trust on any of the property. The agreement of trust falls far short of measuring up to the rule laid down in *Lefrooth v. Prentice,* 202 Cal. 215 (259 Pac. 947). There it

is said (p. 227) that an express trust must be 'reasonably certain in its material terms; and this requisite of certainty includes the *subject matter* or property embraced within the trust, the beneficiaries or persons in whose behalf it is created, the nature and quantity of interest they are to have and the manner in which the trust is to be performed.' (Italics the Court's) A most casual reading of the terms of the oral trust which we have outlined above discloses a complete failure to meet any of the requirements of the rule laid down in the Lefrooth case.

"Moreover, to the creation of the trust, a trust res or subject matter is a *sine qua non*. . . .' 'In order for trusts to exist there must be an estate to vest in the trustee, and the property must be clearly and definitely pointed out.' (*In Re Lamb,* 61 Cal. App. 321 (215 Pac. 109).) Here there was no property in the hands of the alleged trustee. The cash which the father had, totaling $160.00 had already been turned over to (the son). It never became a part of any trust estate, but instead was consumed in living expenses. Accordingly, we think that for want of a trust res, and because of the indefiniteness of the terms of the alleged trust agreement, the agreement was not enforceable. . . ." *Balian v. Balian's Market, supra,* page 156.

It is submitted that the Court in the *Balian* case found the uncertainty surrounding the alleged trust agreement, the designation of the subject or res, and the entire circumstances of the transaction and parties in question to warrant a refusal by the lower court to find

the existence of a trust. It is further submitted that said Court did not hold that the trust failed because no subject or *res* existed at the outset.

In the case of *Molera v. Cooper,* 173 Cal. 259 (1916) the California Supreme Court stated, at page 262, that

> "A mere promise to obtain money and thereupon hold it in trust does not create a trust *until it is at least so far executed that the money has been obtained in accordance with the promise.*" (Emphasis added.)

In the *Molera* case, plaintiff sued upon a written promissory note for $1,000.00 which had been given by defendant to a decedent whose estate plaintiff represented. In defense, defendant alleged that the note had been extinguished by an oral agreement between her and the decedent under which defendant had agreed to hold the sum of $1,000.00, together with interest from the date of the note, in trust for other persons. The Court noted, at page 261, that

> "It is not alleged that the defendant then had in her possession or under her control the money owing upon said note, or that she has at any time since procured the same and devoted the same to said trust, or that she was then or has been since, solvent and able to do so. One ground of (plaintiff's ultimately sustained demurrer) was that the answer was uncertain in that it cannot be ascertained therefrom what particular monies the defendant held in trust as set forth therein, or whether or not any specific amount of money was held in trust. In view of this ground . . . the allegation that the defendant has ever since April 10, 1911

'held and does now hold said amount of money upon the trust proposed' is not to be construed as meaning that the defendant then had the money in hand, or has at any time since then possessed the same and devoted it to said trust. . . . *The case must be considered upon the theory that all (defendant) did in regard to the creation of the trust was to agree that she would thenceforth hold the sum of money specified in the note in trust for the (beneficiaries).* . . . It is clear that no trust was created by the aforesaid arrangement. There *never* was any property in existence which could be the subject of the trust." (Emphasis added.)

The Court went on to make the statement initially quoted. It is submitted that, had the defendant been able to show that she subsequently acquired the money to be held in trust, the Supreme Court would have found that a trust existed under the facts. Otherwise, the italicized portion of the initial quotation from the case could have and most certainly would have been deleted from the opinion.

It is not now, nor has it ever been the position of the undersigned that a trust can exist without a subject or *res*. Rather, it is submitted that the monies in dispute herein became the subject or *res* of an express trust upon their acquisition by Van's. As noted in *89 Corpus Juris Secundum,* Trusts, Section 24, page 741,

> "It has been held . . . that a declaration of trust of property executed before the acquisition of property, does not fail for want of the requisite subject matter, but that the instrument takes full effect when the subsequent title vests in the declarant".

It is submitted that the Supreme Court of California, in the *Molera* case, expressly recognized said rule, and the sparseness of California cases on point attests to its general recognition.

Section 2217 of the California Civil Code provides "An involuntary trust is one which is created by operation of law." Section 2223 of the Civil Code states that "One who wrongfully detains a thing is an involuntary trustee thereof, for the benefit of the owner.", and Section 2224 provides that "One who gains a thing by fraud, accident mistake, undue influence, the violation of a trust, or other wrongful act, is, unless he has some other and better right thereto, an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it." Even if no express trust is found herein by this Honorable Court, it appears clear that Van's, as agent of Security, acted in violation of its agency agreement by its failure to hold the proceeds separate and apart from other funds in its possession. [R. 110, lines 24-31.] 4 Witkin, *Summary of California Law,* Trusts, Section 87, page 2970, indicates that the trusts provided for in Sections 2223 and 2224 of the Civil Code are what are commonly known as "constructive trusts". Furthermore, there is ample authority to the effect that an agent's breach of his duties will prompt the Court to impose such a trust. *4 Witkin, supra,* Section 90, page 2973, and cases there cited; *49 Cal. Jur.* 2d, Trusts, Section 386, page 232, Note 18. Even in the absence of a valid trust under Financial Code Section 12300.3 and an express trust created by and between Van's and Security, it is therefore respectfully submitted that the facts in the case at bar warrant and require the imposition of a constructive trust herein.

3. It Is Not Disputed That Security Must Trace the Trust Subject or Res, and Bumb, as Trustee of the Estate of Security, Has Done so to the Extent Required by California Law.

The parties to the within proceeding have agreed that the funds held by the Association in the sum of $2,014.99 represent monies which were on deposit in Van's bank account prior to October 15, 1963, which represented money orders sold by Van's for Security. [R. 110, lines 23-27.] It is thus submitted that trust funds in the sum of $2,014.99 (whether they be deemed the subject of a statutory, express, or constructive trust) have been fully and adequately traced and that Bumb, as Trustee of the Estate of Security, is clearly entitled thereto.

As to the balance of $1,094.17, Section 12300.3 of the California Financial Code provides, in part,

> "If . . . an agent . . . shall commingle (receipts heretofore discussed) with those of his own, all assets of such agent shall be impressed with a trust in favor of . . . the licensee in an amount equal to the aggregate funds received or which should have been received by the agent. . . . Such trust shall continue until an amount equal to said funds is separated from those of the agent and transmitted to the licensee or deposited in the trust account of licensee. . . ."

It is respectfully submitted that this portion of Section 12300.3 provides a remedy in the nature of or analogous to a resulting or constructive trust upon the assets of a commingling agent. It alleviates the difficulties which might otherwise be experienced in attempting to trace wrongfully commingled funds, and to this extent

may be said to constitute an important change in the trust law of the State of California. Even if the quoted language be deemed to create a statutory trust, it is submitted that the creation thereof is fully within the authority of the California Legislature; that it is a *trust,* not a lien, and should not be treated as the latter under the Bankruptcy Act; and that the $1,094.17 which is the *res* thereof was in the possession of Van's as agent of Security, and thus within the possession of Security within the meaning of Section 67(c)(2) of the Bankruptcy Act, all for the same reasons as previously set forth at length above.

4. The Funds in Dispute Are Trust Funds and Are Not Within the Scope of Section 64 of the Bankruptcy Act.

As recognized in *4 Collier, supra,* paragraph 70.25, page 1202, *et seq.*

> "The Rule is elementary that a trustee in bankruptcy . . . succeeds only to the title and rights in the property that the debtor possessed, but armed, of course, with the special rights and powers conferred upon the trustee by the Act itself. Therefore, where the bankrupt or debtor was in the possession of property impressed with a trust which is valid under the terms of the Act, the bankruptcy or reorganization trustee can only hold such property subject to the outstanding interest of the beneficiaries. When it appears that the bankrupt was only a trustee and had no beneficial interest in or claim against the property, even though he held the legal title thereto which passed to the bankruptcy trustee, the Court should turn the property over to its true owners where possible."

As further stated in the treatise, "The system of priorities established by Section 64 for the distribution of the estate to unsecured creditors does not govern or control the payment or delivery of the trust property." *4 Collier, supra,* paragraph 70.25, page 1204; and see *3 Remington, supra,* Section 1212 *et seq.,* page 48 *et seq.*

In view of the above, it is submitted that Section 64 of the Bankruptcy Act has no application herein because the funds in question are trust funds as aforesaid.

Conclusion.

For the foregoing reasons, the Order of the District Court should be affirmed and the funds which are the subject of the within appeal should be ordered turned over to Bumb as Trustee of the Estate of Security.

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Certificate.

I certify that, in connection with the preparation of this Brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the 9th Circuit, and that, in my opinion, the foregoing Brief is in full compliance with those rules.

ROBERT W. ALBERTS